IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
BENCH AT JAIPUR

ORDER
IN
S.B. Civil Misc. Stay Application No.637/2004
In
S.B. Civil Second Appeal No.157/2004

Head Master, Government Uccha Prathmik Vidyalaya, Anand Nagar, Sikar, District Sikar & 3 Others
...defendant-appellants
Versus
Satya Dev Yadav S/o Shri Ganga Ram Yadav
...plaintiff-respondent

Date of Order ::: 10.11.2006

Present
Hon'ble Mr. Justice Narendra Kumar Jain

Shri B.L. Awasthi, Addl. G.A., for defendant-appellants
Shri B.L. Agarwal, Counsel for plaintiff-respondent
###

By the Court:-

Heard learned counsel for both the parties on the stay application under Order 41 Rule 5 read with Section 151 of the Code of Civil Procedure.

Learned counsel for the defendant-appellants submits that the appeal has already been admitted, therefore, the order for dispossession of the appellant be stayed during the pendency of the second appeal. On the other hand, the learned counsel for the respondent contended that both the courts below have passed a decree of possession in respect of the disputed property, therefore, even if the appeal has

been admitted then either the stay application be dismissed or at-least the mesne profit be awarded in favour of the plaintiff-respondent.

The plaintiff-respondent filed a suit in respect of the disputed property for eviction under the provisions of the Rajasthan Premises (Control of Rent & Eviction) Act, 1950. However, both the courts below decided the relationship of landlord and tenant in between the plaintiff and the tenant against the plaintiff and held that the disputed property was not rented out to the defendant but it was given to run a school. However, on the basis of title of the plaintiff, a decree of possession has been passed in the suit for eviction under the provisions of the Act, 1950. However, looking to the facts and circumstances of the case that both the courts below have decreed the suit for possession in respect of the disputed property in favour of the plaintiff, I think it fit and proper that this is a fit case to award the mesne profit during the pendency of the second appeal.

The Hon'ble Supreme Court in the case of **Atma Ram Properties (P) Ltd. Vs. Federal Motors (P) Ltd., (2005) 1 SCC 705**, considered the jurisdiction of the appellate Court while passing order of stay under Order 41 Rule 5 of the C.P.C., and held that the

appellate court has jurisdiction to put the applicant under Order 41 Rule 5 of the C.P.C., on such reasonable terms as would, in its opinion, reasonably compensate the decree-holder for loss occasioned by delay in execution of the decree by grant of stay, while passing the stay order in his favour, in the event of the appeal being dismissed. The Hon'ble Apex Court in the above referred case held as under :

> “19. To sum up, our conclusions are:
>
> 1. While passing an order of stay under Rule 5 of Order 41 of the Code of Civil Procedure, 1908, the appellate Court does have jurisdiction to put the applicant on such reasonable terms as would, in its opinion, reasonably compensate the decree-holder for loss occasioned by delay in execution of decree by the grant of stay order, in the event of the appeal being dismissed and insofar as those proceedings are concerned. Such terms, needless to say, shall be reasonable.
>
> 2. In case of premises governed by the provisions of the Delhi Rent Control Act, 1958, in view of the definition of tenant contained in clause (1) of Section 2 of the Act, the tenancy does not stand terminated merely by its termination under the general law; it terminates

> with the passing of the decree for eviction. With effect from that date, the tenant is liable to pay mesne profits or compensation for use and occupation of the premises at the same rate at which the landlord would have been able to let out the premises and earn rent if the tenant would have vacated the premises. The landlord is not bound by the contractual rate of rent effective for the period preceding the date of the decree.
>
> 3. The doctrine of merger does not have the effect of postponing the date of termination of tenancy merely because the decree of eviction stands merged in the decree passed by the superior forum at a latter date".

The Hon'ble Supreme Court again in **Anderson Wright & Company Vs. Amar Nath Roy, 2005 DNJ (SC) 562,** while considering its earlier judgment in Atma Ram Properties (P) Limited's case (Supra) reiterated the same proposition of law.

This Court in Madan Bansal Vs. Ramnarayan Sharma, RLR 2006 (1) 733, considered the similar point and observed as under:-

> ".... the criteria for admission of the appeal are altogether different than what adopted at the time of hearing of the appeal

> for final disposal. Even if the appeal is admitted by the First Appellate Court being a statutory appeal or second appeal as substantial question of law arises then it does not mean that it will be allowed finally. Once appeal is admitted, then it is commonly known, that it goes for hearing in Due Course and due to long list of pending old appeals, it takes quite considerable long time in its final disposal. In such circumstances a decree-holder is not only deprived of getting the possession of the rented premises, but also deprived of the monthly rent or the mesne profit or compensation for use and occupation of the rented premises as per the market value of the shop or the prevalent rent of the premises. The order 41 Rule 5 of the CPC gives jurisdiction to the appellate court to pass interim stay staying the execution of the decree but the interim stay order is required to be passed reasonably and while doing so the interest of decree-holder is also required to be protected."

After considering the fact that the plaintiff-respondent is entitled for mesne profit in respect of the disputed property, now I decide the question as to what amount should be fixed as mesne profit to be paid

by the appellants to the respondent in respect of the disputed property. The learned counsel for the respondent contended that at present the market rate of the monthly rent of the disputed property is above Rs.10,000/-. There are four rooms in which school is running. Therefore, after considering all the facts and circumstances of the case as well as the rival submissions of the learned counsel for both the parties, I am of the view that once the second appeal is admitted, then the decree of possession should be stayed and accordingly I stay the decree of possession passed against the defendant-appellants during the pendency of this second appeal, on the following terms and conditions:-

> 1. That the defendant-appellants shall deposit/pay the monthly mesne profit in respect of the disputed property with effect from 1st of November, 2006 at the rate of Rs.1000/- per month by 15th day of each succeeding month or in advance in the Bank Account of the plaintiff-respondent, the details of which will be furnished by the plaintiff-respondent within a period of two weeks to the defendant-appellants

or their counsel. In case the details of the Bank Account are not furnished then the defendant-appellants may deposit the amount, in question, in the lower court itself.

It is made clear that in case the mesne profit, as directed above, is not deposited/paid with effect from 1.11.2006, for consecutive four months, then it will be open for the plaintiff-respondent to get the decree, passed in his favour by the courts below, executed even during the pendency of this second appeal.

The stay application accordingly stands disposed of.

(Narendra Kumar Jain) J.

//Jaiman//